United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7283

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Plaintiffs-Appellants,

v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLEES NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., BUNKER RAMO CORP., and NATIONAL CLEARING CORP.

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 2

ARGUMENT:

POINT I—The District Court Properly Granted Defendants' Motions To Dismiss Since Primary and Exclusive Jurisdiction Lies with the Securities and Exchange Commission 4

POINT II—The District Court Properly Granted Defendants' Motion To Dismiss Since the Actions of Defendants Are Exempt from the Application of the Antitrust Laws 16

POINT III—The Securities Acts Amendments of 1975 Do Not Require that the Judgment Be Vacated and that This Action Be Remanded to the District Court for Further Consideration 27

CONCLUSION 32

TABLE OF AUTHORITIES

CASES:

Gordon v. *New York Stock Exchange*, 422 U.S. 659 (1975) 15, 22, 23, 24

In re National Association of Securities Dealers, Inc., 5 S.E.C. 627 (1939) 5, 17

In the Matter of the National Association of Securities Dealers, Inc., 20 S.E.C. 508 (1945) 19

National Association of Securities Dealers, Inc., Exchange Act Release No. 9682 (June 7, 1972), *aff'd sub nom. NASD* v. *SEC*, 486 F.2d 1314 (C.A.D.C. 1973) 13

Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 15

Page

R. H. Johnson & Co. v. *SEC*, 198 F.2d 690, (2d Cir.) *cert. den.* 344 U.S. 855 (1952) 22

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 13, 15, 18, 21, 22, 27

Thill Securities Corp. v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. den.* 401 U.S. 994 (1971) 14, 15

United States v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) 19

United States v. *NASD*, 422 U.S. 694 (1975) 5, 6, 15, 24, 25, 27

United States v. *Socony-Vacuum Oil Co.*, 301 U.S. 150 (1940) 26

STATUTES: *

The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* ..... *passim*

The Securities Acts Amendments of 1975 P.L. 94-29, 15 U.S.C. §§ 78a *et seq.* ..... *passim*

The Maloney Act, 15 U.S.C. §§ 78o-3 *et seq.* ..... *passim*

The Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* 24

The Administrative Procedure Act, 5 U.S.C. §§ 551-559 13

The Commodities Exchange Act, 7 U.S.C. §§ 1 *et seq.* .. 15

15 U.S.C. § 78o-3(a) 26

15 U.S.C. § 78o-3(b) 6, 25, 26

15 U.S.C. § 78o-3(b)(8) 5, 15, 17, 24, 28

15 U.S.C. § 78o-3(b)(9) 5

15 U.S.C. § 78o-3(b)(10) 5

15 U.S.C. § 78o-3(b)(12) 7, 15, 19, 24

* United States Code Citations of the Securities Acts Amendments of 1975 were taken from the United States Code Annotated (West, Aug. 1975 Supp.)

Page

15 U.S.C. § 78o-3(c) 26

15 U.S.C. § 78o-3(d) 6

15 U.S.C. § 78c-3(e) 6, 25, 28

15 U.S.C. § 78o-3(g) 5, 22

15 U.S.C. § 78o-3(h) 5, 22, 25

15 U.S.C. § 78o-3(i) 18

15 U.S.C. § 78o-3(j) 7, 15, 24, 25, 26, 28

15 U.S.C. § 78o-3(k) 5, 12, 15, 24, 25, 26, 29

15 U.S.C. § 78o-3(n) 20

15 U.S.C. § 78s 10, 14

15 U.S.C. § 78y 5, 10, 12, 15, 22

15 U.S.C. § 78s(a) as amended by the Securities Acts Amendments of 1975 ..... 6, 29

15 U.S.C. § 78s(b) as amended by the Securities Acts Amendments of 1975 29

15 U.S.C. § 78s(c) as amended by the Securities Acts Amendments of 1975 29

15 U.S.C. § 78q-1 as amended by the Securities Acts Amendments of 1975 10

15 U.S.C. § 78o-3(b)(6) as amended by the Securities Acts Amendments of 1975 ..... 28, 29

15 U.S.C. § 78o-3(b)(11) as amended by the Securities Acts Amendments of 1975 19

52 Stat. 1070 (1938) 17

OTHER AUTHORITIES:

S. Rep. No. 94-75, 94th Cong. 1st Sess (1975) 6, 14, 18, 19, 25, 30, 31

Rule 3(c), General Rules of United States District Courts for the Southern and Eastern Districts of New York 3

Page

Rule 4, General Rules of United States District Courts for the Southern and Eastern Districts of New York 3

II L. LOSS, *Securities Regulation,* Ch. 8C § 3 (2 Ed. 1961) 20

Letter of Chairman Manuel F. Cohen dated July 30, 1965, to Chairman of the Senate Committee on Banking and Currency 20

Rules of Fair Practice, Article III, Section 25, National Association of Securities Dealers, Inc., Securities Dealers Manual 18

By-Laws, Article XVI, Schedule D, Section V(G), National Association of Securities Dealers, Inc., Securities Dealers Manual 9

By-Laws, Article XVII, Schedule F, Section 7, National Association of Securities Dealers, Inc., Securities Dealers Manual 11, 12

17 C.F.R. 240.15Aj-2 ..... 7, 9

17 C.F.R. 240.15Aj-3 ..... 10, 11

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Plaintiffs-Appellants,

v.

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF APPELLEES NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., BUNKER RAMO CORP., and NATIONAL CLEARING CORP.

PRELIMINARY STATEMENT

Plaintiffs appeal from a judgment dismissing their Complaint as to all defendants without leave to replead. (A. 3,

A. 270).* Additionally, Plaintiffs urge that a subsequent change in the law, the passage of the Securities Acts Amendments of 1975,** requires that the case be remanded to the District Court. We submit that Judge Griesa was correct in dismissing the Complaint as to the defendants National Association of Securities Dealers, Inc., Bunker Ramo Corporation and the National Clearing Corporation and that the subsequent change in the law does not require remand.

STATEMENT OF FACTS

On October 22, 1975, plaintiffs, Samuel H. Sloan and Samuel H. Sloan and Co. ("Plaintiff"), filed an Amended Complaint in 74 Civ. 2792 (S.D.N.Y.) naming as additional defendants to an action against the Securities and Exchange Commission ("Commission"), filed June 24, 1974, among others, the National Association of Securities Dealers, Inc. ("NASD"), Bunker Ramo Corporation ("Bunker Ramo") and the National Clearing Corporation ("NCC"), hereinafter collectively, the "Defendants." (A. 2, A. 26).[1]

The Amended Complaint alleged that certain actions taken by Defendants violated the antitrust laws, in addition to making numerous frivolous allegations. (A. 26-65). On January 31, 1975, Notice of Motions to Dismiss and

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* All references proceeded by "A." are to the Joint Appendix on Appeal.

** Pub. L. No. 94-29 (June 4, 1975) as codified in 15 U.S.C. §§ 78a *et seq.* (Supp. 1975).

[1] Defendants NASD, Bunker Ramo and NCC joined in motions to dismiss since it was believed that the central issue in the Complaint appeared to be directed at actions taken either jointly or separately by the Defendants in accordance with the regulatory responsibilities of the NASD, a registered national securities association. NCC is the wholly owned subsidiary of the NASD which provides clearance and settlement services to NASD members and other entities. Bunker Ramo is the operator of the NASD's automated quotation system ("NASDAQ"), which was developed at the direction of and regulated by the NASD.

For Judgment on the Pleadings and a Memorandum in support thereof, were filed by the Defendants. (A. 2, A. 137). Plaintiff filed Cross-Motions on February 5, 1975 requesting, among other things, an order disqualifying Dennis C. Hensley, Esq., Lloyd J. Derrickson, Esq., and Robert J. Woldow, Esq. as counsel for Defendants. (A. 3, A. 186).

On February 14, 1975, Judge Griesa, at the hearing on the motions to dismiss, heard oral argument from counsel for the Commission. The hearing was attended in addition by counsel for the other defendants, including Robert J. Woldow, Esq. and Richard Lyon, Esq. for the NASD, Bunker Ramo and NCC. At the hearing, Judge Griesa granted the Commission's motion to dismiss, on oral argument, and the motions of the several other defendants to dismiss without oral argument. Judge Griesa granted such motions to dismiss without leave to replead. Additionally, Judge Griesa denied Plaintiff's motions for, among other things, an order disqualifying Defendant's counsel as "absolutely frivolous."[2]

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[2] Plaintiff argues that the District Court erred in failing to disqualify Dennis C. Hensley, Lloyd J. Derrickson, and Robert J. Woldow from appearing as counsel for defendants NASD, Bunker Ramo and NCC, based upon the fact that Messrs. Derrickson, Hensley and Woldow were not members of the bar of the Southern District of New York. Pursuant to Rule 4 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York, Defendants designated a member of the bar of the Southern District of New York having an office within the Southern District of New York upon whom service of papers could be made; for purposes of said rule, Richard Lyon, Esq. of the law firm of Breed, Abbott & Morgan, One Chase Manhattan Plaza, New York, New York was so designated.

At the hearing, on February 14, 1975, on Defendant's Motions to Dismiss, Mr. Lyon appeared with Mr. Woldow for the purpose of making a motion under Rule 3(c) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York that Mr. Woldow be permitted to argue the motion to dismiss as counsel for Defendants. Mr. Lyon and Mr. Woldow each identified themselves to the Court.

Judge Griesa, however, declined to hear oral argument on behalf of said Defendants and proceeded to grant their motions based upon their Memorandum. Thus it was unnecessary for an oral motion to be made by Mr. Lyon. Accordingly,

On February 27, 1975, judgment was entered by the Clerk of the Court dismissing the Complaint as to all defendants without leave to replead (A. 2, A. 270).

On February 24, 1975, however, Plaintiff filed a Notice of Motion for Reargument alleging that, among other things, there is no proceeding pursuant to any sections of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a *et seq.*, (the "Exchange Act") or the rules and customs of the NASD or of the Commission wherein a private party can file a petition to abrogate or otherwise challenge a rule or regulation of said Defendants. (A. 3, A. 265).

On March 4, 1975, Defendants filed a Notice of Motion in Opposition to Plaintiff's Motion for Reargument with an accompanying Memorandum in support of its Motion. (A. 4).

On April 1, 1975, Judge Griesa endorsed an order denying Plaintiff's Motion for Reargument. (A. 4).

On March 28, 1975, Plaintiff filed a Notice of Appeal from the order of Judge Griesa (A. 4). Plaintiff's brief was received by Defendants on November 17, 1975.

ARGUMENT

POINT I

The District Court Properly Granted Defendants' Motions to Dismiss Since Primary and Exclusive Jurisdiction Lies with the Securities and Exchange Commission.

A. *Statutory Basis* [3]

Pursuant to Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o-3 *et seq.* (the "Maloney Act" or

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the Court was correct in finding no basis for Plaintiff's claim that Messrs. Hensley, Derrickson and Woldow should have been disqualified.

[3] All references are to the Securities Exchange Act of 1934, as amended prior to June 4, 1975 unless otherwise stated.

"Section 15A"), the proper forum for the deliberation of the subject matter of the Complaint is primarily and exclusively the Securities and Exchange Commission.

Section 15A was added to the Exchange Act by the Maloney Act in order "[t]o provide . . . a mechanism of regulation among over-the-counter brokers and dealers . . . [and] to prevent acts and practices inconsistent with just and equitable principles of trade . . ." 15 U.S.C. § 78o-3 (b)(8). The mechanism provided was a membership association registered with the Securities and Exchange Commission for purposes of regulatory oversight; the NASD is the only national securities association so registered. *In re National Association of Securities Dealers, Inc.*, 5 SEC 627 (1939). The Maloney Act addressed, among other things, the procedure by which regulations of a registered national securities association could be challenged. As indicated in the District Court, that procedure was by way of a Petition to Abrogate filed by the Securities and Exchange Commission, with appeal to the appropriate United States Court of Appeals 15 U.S.C. § 78o-3(k); 15 U.S.C. § 78y.[4] Comparable procedures were also provided by Congress in order to challenge disciplinary and other actions taken by such an association. 15 U.S.C. §§ 78o-3 (b) (9), (10), (g) and (h); 15 U.S.C. § 78y.[5]

Accordingly, Congress clearly intended that a challenge to NASD rules and interpretations must follow the procedures prescribed in the Maloney Act. In accepting its responsibility, the Securities and Exchange Commission has consistently taken the public position that an initial attack on an NASD rule, is one ". . . over which the Commission is granted exclusive jurisdiction by Section 15A of the . . . Exchange Act. . . ." *United States* v. *National*

[4] See also, "Memorandum in Support of Defendants' Motion for Dismissal and Motion for Judgment on the Pleadings" (hereinafter "Defendants' Memorandum") at 7-8.

[5] See Defendants' Memorandum at 7.

Association of Securities Dealers, Inc., 422 U.S. 694, 731 n. 43 (1975); Memorandum of Law in Support of Motion of the Defendant Securities and Exchange Commission to Dismiss or for Summary Judgment, at 16.

The regulatory scheme established for a registered securities association has been characterized by Congress as one comprised of specific "affirmative and negative requirements." "Report of the Committee on Banking, Housing and Urban Affairs, United States Senate," S. Rep. No. 94-75, 94th Cong. 1st Sess. (1975). Thus, a securities association may not become registered unless the Securities and Exchange Commission has determined that the Association has adopted the rules required by Section 15A. To this end, Section 15A(e), 15 U.S.C. § 78o-3(e), provided in pertinent part:[6]

> . . . the Commission shall by order grant such registration if the requirements of this section are satisfied. If . . . it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration.

Additionally, any change or addition to the rules of a registered securities association could not become effective until the Commission was afforded an opportunity for review of such rules under a Congressionally mandated *obligation* to disapprove such change or addition unless consistent with the requirements of Sections 15A(b) and (d), 15 U.S.C. §§ 78o-3(b) and (d), setting out the prerequisites which an association's rules must contain in order for

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[6] Similarly, Section 19(a), 15 U.S.C. § 78s(a), of the Exchange Act as amended by the Securities Acts Amendments of 1975, which replaces Section 15A(e), provides substantially the same requirement:

> [T]he Commission shall grant such registration if it finds the requirements of this chapter and the rules and regulations thereunder with respect to . . . (a securities association requesting registration under the Exchange Act) . . . are satisfied. The Commission shall deny such registration if it does not make such finding.

the Association to be registered. Section 15A(j), 15 U.S.C. § 78o-3(j).

The Maloney Act speaks specifically to the regulation of securities quotations and the Commission has promulgated rules accordingly. As part of the registration requirement for a national securities association, Section 15A (b)(12), 15 U.S.C. § 78o-3(b)(12) provides:

> the rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be disseminated by any member or any person associated with a member, and the persons to whom such quotations may be supplied. Such rules . . . shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations.
>
> . . . the Commission may, after notice and opportunity for hearing, suspend the registration of any association if it finds the rules thereof do not conform to the requirements of this subsection . . ., and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.

The Maloney Act requirements have been specifically applied to the NASDAQ system, which was developed, owned and operated by Bunker Ramo under the direction of, and in accordance with, the By-Laws and rules of the NASD, by Exchange Act Rule 15Aj-2, 17 C.F.R. 240. 15Aj-2. Said rule required that:

> (a) Any national securities association which adopts, or proposes to adopt, any rules providing for or regulating a system for the quotation of bid or offering or other prices of securities shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accord-

ance with the standards of subparagraphs 8 and 12 of paragraph (b) and paragraph (h)(2) of Section 15A of the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.

(b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

(1) for notice of and opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;

(2) that a record shall be kept; and

(3) that the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the association (including the provisions thereof required to be included by paragraph (a) of

> this Rule), the Commission shall by order dismiss the proceeding. Otherwise the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

The NASD has adopted Article XVI of its By-Laws[7] in accordance with Exchange Act Rule 15Aj-2 thereby providing, *inter alia,* that members and *other persons* aggrieved by the application of NASDAQ "qualifications, criteria, standards and charges . . ." by the NASD or by the operation of the NASDAQ System ". . . shall, upon filing a complaint with the . . . (NASD Board of Governors) . . . be entitled to a hearing thereon (if requested,, decision and review by the Board in accordance with procedures specified by the Board." Schedule D of Article XVI provides further that:

> In any case where a complainant feels aggrieved by any decision of, or action taken by and/or approved by the Board of Governors in relation to the NASDAQ System, and the statute permits appeal, the complainant may make application for review to the Securities and Exchange Commission in accordance with Section 15A of the Securities Exchange Act of 1934, as amended.

Accordingly, as required by Exchange Act Rule 15Aj-2, Plaintiff is afforded the right and opportunity to challenge NASD rules and charges and NASD and Bunker Ramo practices initially before the NASD Board of Governors and on review to the Securities and Exchange Commission. As noted in the Court below, judicial review of the Commission's order by the appropriate United States Court

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[7] See Defendants' Memorandum in Opposition to Plaintiff's Motion for Reargument (hereinafter "Defendants' Memorandum in Opposition") at 4-7.

of Appeals is available pursuant to Section 25(a) of the Exchange Act. 15 U.S.C. § 78y(a).

Similarly, the Maloney Act requirements have been specifically applied to the NASD's clearing subsidiary, NCC,[8] by Exchange Act Rule 15Aj-3, 17 C.F.R. 240.15Aj-3.

Exchange Act Rule 15Aj-3 required, among other things, any NASD rules, with respect to the operation of systems and facilities for clearance and settlement of securities, to "provide a fair and orderly procedure" with respect to access to such system:

> (a) Any national securities association which directly or indirectly adopts, or proposes to adopt, any rules providing for or regulating a system for the clearance and/or settlement of securities transactions shall incorporate in such rules a provision to the effect that insofar as such rules prescribe the conditions of access to such system, such rules shall be applied and interpreted in accordance with the standards of paragraph (b)(8) of Section 15 Aof the Act, including the requirement that rules of such an association shall be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and not to permit unfair discrimination between customers or issuers, or brokers or dealers; and to assure that any disciplinary action pursuant to such rules shall not be excessive or oppressive, having due regard to the public interest.
>
> (b) Such rules shall also provide a fair and orderly procedure with respect to the determination of whether any customer or issuer or broker or dealer may be excluded or limited in respect of requested access to such system including provisions:

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[8] Similarly the Securities Acts Amendments of 1975 have added a new Section 17A to the Exchange Act. 15 U.S.C § 78q-1. Section 17A acts to extend the requirements of the Maloney Act to clearing agencies which apply for and became registered with the Commission pursuant to Section 19 of the Exchange Act. 15 U.S.C. § 78s. Accordingly, on December 1, 1975, NCC became so registered with the Commission and now files its own rules addiitons and changes.

(1) for notice of an opportunity to be heard upon the specific grounds for exclusion or limitation which are under consideration;

(2) that a record shall be kept; and

(3) that the determination shall set forth the specific grounds upon which the exclusion or limitation is based.

(c) In the event of any such exclusion or limitation, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within 30 days after such action has been taken or within such longer period as the Commission may determine. In any proceeding for such review, if the Commission, after appropriate notice and opportunity for hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such action is based exist in fact and are in accord with the applicable rules of the Association (including the provisions thereof required to be included by paragraph (a) of this rule), the Commission shall by order dismiss the proceeding. Otherwise, the Commission shall by order set aside the action of the association and require the association to accord the aggrieved person access to such system or to take such other action as may be appropriate, subject to such terms and conditions as the Commission determines to be in accordance with the public interest and consistent with the rules of such association.

The NASD, subsequent to the promulgation of Exchange Act Rule 15Aj-3, promptly added Article XVII to its By-Laws, which provides, *inter alia*, that members and *other persons* aggrieved by the "rules, qualifications, criteria, standards and charges . . ." applied by NCC or by the operation of the NCC system in any case for which binding and final arbitration has not been provided by the rules of NCC ". . . shall . . . upon filing a complaint with the Board of Governors of the . . . (NASD) . . . be entitled to a hear-

ing thereon, if requested, decision and review by the Board of Governors in accordance with the procedures specified by the Board." Schedule F of Article XVII of the NASD By-Laws provides further that:

> In any case where a complainant feels aggrieved by any decision of or action taken by and/or approved by the Board of Governors in relation to the National Clearing Corporation, and the statute permits appeal, the complainant may make application for review to the Securities and Exchange Commission in accordance with Section 15A of the Securities Exchange Act of 1934, as amended.

The limitation as to grievances which are required to be submitted to arbitration would not be applicable to Plaintiff's allegations in the case at bar.[9] In addition, although NCC operates pursuant to By-Laws and rules separate from the NASD's, NCC's By-Laws and rules have been, since NCC's association with the NASD in 1971, submitted to the Securities and Exchange Commission for review and non-disapproval. (A. 145).

Accordingly, as required by Exchange Act Rule 15Aj-3, Plaintiff is afforded the right and opportunity to challenge the NASD and NCC rules and NCC's procedures initially before the NASD Board of Governors and on review to the Securities and Exchange Commission. Judicial review of the Commission's order is available pursuant to Section 25A of the Exchange Act. 15 U.S.C. § 78y(a).

The mandate of Congress that the Commission act in accordance with Section 15A was complimented by the abrogation powers of the Commission pursuant to Section 15A(k), 15 U.S.C. § 78o-3(k). Accordingly, the Commission is authorized to abrogate, by order, any rule of the NASD, including the rules for regulating quotations and clearance and settlement of securities, where appropriate to assure

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[9] Defendants' Memorandum in Opposit[illegible]t 12.

". . . fair dealing by the members of . . . (the NASD) . . . if it appears to the Commission that . . . (such) . . . is necessary or appropriate . . . to protect investors or to otherwise effectuate the purposes of . . . (the Exchange Act) . . . ."

As discussed *supra*, a national securities association may not become registered unless the Securities and Exchange Commission has determined that the association's rules are in accordance with Section 15A.

As noted in Plaintiff's brief on appeal, the Commission has used this power to abrogate an interpretation by the NASD of one of its rules in the underwriting area. Thereafter, the Commission's decision was affirmed by the Court of Appeals in accordance with the prescribed procedures. *National Association of Securities Dealers, Inc.*, Securities Exchange Act Release No. 9682 (June 7, 1972), *aff'd, NASD* v. *SEC*, 486 F.2d 1314 (CADC 1973). This action resulted from a petition, filed by non-members of the NASD, with the Commission to institute abrogation proceedings pursuant to Section 15A(k).

It should be noted that in addition to Plaintiff's remedies pursuant to the statutory scheme provided by the Maloney Act, the federal Administrative Procedure Act, 5 U.S.C. §§ 551-559, provides Plaintiff with the right to petition the Commission for amendment of its rules in order to prevent exclusionary practices which Plaintiff allegedly has experienced.

B. *Decisions of the Courts (Appellate Precedent)*

In an antitrust case challenging a rule of a national securities exchange, *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court, while not reaching the issue of primary jurisdiction in its decision, noted that a different result might have been reached if exchange self-regulation were subject to the jurisdiction of the Se-

curities and Exchange Commission and ultimately judicial review as is NASD self-regulation. 373 U.S. at 358.

Seven years later, the decision handed down in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. den.* 401 U.S. 994 (1971), addressed certain factors which the United States Court of Appeals, Seventh Circuit, believed may be considered in reaching the issue of whether primary jurisdiction in the Commission exists. In *Thill*, the Court of Appeals reversed a grant of summary judgment in favor of the New York Stock Exchange and remanded to the District Court for further evidence regarding: the effects of an exchange rule on competition, the degree of actual review by the Commission, and the extent to which the rule was necessary to make the Exchange Act work. 433 F.2d at 270. The Court of Appeals suggested the consideration of two additional factors, 433 F.2d at 277:

> [w]hether an aggrieved party may initiate SEC review of Exchange rules under the provision of the Securities Exchange Act . . .;

and

> [w]hether and to what extent SEC expertise would be useful in resolving, in the first instance, the question of whether a given rule is necessary to make the Exchange Act work . . .;

It is important to note that there has been a statutory difference in the scope of Commission authority over the exchanges and the NASD. As stated in the "Report of the Committee on Banking, Housing and Urban Affairs, United States Senate" *supra*, the Exchange Act prior to the 1975 Amendments, contained anomalies with regard to the Commission's statutory powers over an exchange and over a securities association. Prior to June 4, 1975, Section 19 of the Exchange Act, 15 U.S.C. § 78s, granted only limited authority to the Commission with regard to the amendment

of exchange rules whereas Section 15A [10] of the Exchange Act *required* a national securities association to adopt and maintain certain rules, subject to review and possible alteration, amendment, supplementation, or abrogation by the Commission, if the requirements were not met.[11] Finally, as noted above, judicial review of Commission action was and remains available pursuant to Section 25 of the Exchange Act. 15 U.S.C. § 78y.

Plaintiff has contended throughout his appellate brief, contrary to *Silver* and *Thill*, that the Commission has neither the competency nor the impartiality to decide the questions which he has raised.

The Supreme Court in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), recognized that even in cases where the existence of antitrust immunity is unclear, which is not the case at bar, proceedings on the antitrust questions should be stayed pending administrative review by the regulatory agency involved. *Ricci* involved a private antitrust complaint charging that the Chicago Mercantile Exchange arbitrarily transferred a membership in violation of the Commodities Exchange Act, 7 U.S.C. §§ 1 *et seq.* and the exchange rules. The Supreme Court concluded that consideration of the antitrust claims should be stayed pending initial determination by the Commodity Exchange Commission as to whether the actions taken were, in fact, violative of the act or rules.

Two recent cases in the Supreme Court, *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975) and *United States* v. *NASD*, 422 U.S. 694 (1975),[12] where the actions of the New York Stock Exchange and the NASD were found to be immune from antitrust challenge, indicate that

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[10] See 15 U.S.C. §78o-3(b)(8); 15 U.S.C. § 78o-3(b)(12).

[11] 15 U.S.C. §§ 78o-3(j) and (k).

[12] Discussed in more detail in Point II.

the primary determination should be made not by the Courts but by the statutorily created regulatory agency empowered to oversee activities under the Exchange Act.

The District Court, citing the Maloney Act and Section 25 of the Exchange Act held that the claims against the NASD, Bunker Ramo and NCC stemmed from "NASD regulations promulgated under the Maloney Act" and that there are specific provisions for challenging such rules and regulations by resort to the Commission with appeal to the Court of Appeals; "not an action in this (the District) court." (A. 309-311).

Accordingly, in light of the pervasive regulatory scheme established by statute and enforced by the Commission, and the affirmation of such by the courts, it is clear that Plaintiff has failed to pursue the Congressionally established procedures for review of the challenged actions. In doing so, the agency with the expertise and statutory power to act in the first instance has been avoided and thus the District Court properly granted Defendants' Motion to Dismiss.

POINT II

The District Court Properly Granted Defendants' Motion to Dismiss Since the Actions of Defendants Are Exempt from the Application of the Antitrust Laws.

Plaintiff has argued that the actions of the NASD, Bunker Ramo and NCC, alleged in theComplaint, violated the antitrust laws. Appellant's Brief pp. 35-51. As asserted in the District Court, these actions were expressly exempt from the antitrust laws when the NASD was acting, either directly or through its systems operator, Bunker Ramo, or its wholly owned securities clearance subsidiary, NCC, pursuant to or as required by the Maloney Act.[13] Assuming arguendo that this express exemption was not avail-

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[13] Defendants' Memorandum at 17.

able, the actions of Defendants would fall squarely within the criteria established by the courts relating to implied exemptions from the operation of the antitrust laws. *Id.*

A. *The Express Exemption*

The Exchange Act was amended in 1938 to add the Maloney Act. 52 Stat. 1070 (1938). The regulatory features of the Maloney Act were to be effectuated through self-regulation by over-the-counter brokers and dealers. The formation and qualification of national securities associations was the vehicle Congress envisioned in order to so carry out industry self-regulation. The NASD, however, is the only national securities association which has registered pursuant to the Maloney Act. *In re National Association of Securities Dealers, Inc., supra.* As Defendants have demonstrated, the regulatory scheme of Section 15A subjected the NASD and its subsidiary NCC to comprehensive oversight and review and potent regulation by the Securities and Exchange Commission.

The Maloney Act provided[14] in Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8), that before a securities association can be registered, in addition to other requirements, its rules must be designed:

> . . . to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates or commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers, or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of

[14] It should be noted that the Maloney Act, as it has been amended by the 1975 Amendments, retains substantially the same requirements as it contained prior to June 4, 1975. For example, the requirements in Section 15A(b)(8) and Section 15A(i)(1) as set out above are now contained in Section 15A(b)(6) and Section 15A(e) respectively.

> prices, or to impose any schedule of fixed minimum rates or commissions, allowances, discounts, or other charges.

Section 15A(i)(1), 15 U.S.C. § 78o-3(i)(1), stated:

> The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer . . . except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

Accordingly, the NASD has adopted, pursuant to the Maloney Act's mandate, Article III, Rule 25 of the NASD Rules of Fair Practice.

Plaintiff has argued that the exclusionary policy of the NASD in permitting only NASD members to subscribe to Level III of NASDAQ violates the antitrust laws and has stated with assurance that Congress could not have intended to exempt this policy from the Sherman and Clayton Acts. It is important to note that the NASD, unlike the exchanges, has no restriction on membership. The NASD's undertaking to regulate a broker or dealer is not discretionary with respect to persons qualified for membership.

> [I]n other words, if a person meets the requirements for membership . . . (contained in Section 15A) . . ., he must be admitted. (Section . . . 15A(b)(3)) S. Rep. No. 94-75 at 24.

However, Congress has stated that:

> . . . a self-regulatory organization must be able to prevent an unqualified person from obtaining access to facilities and business opportunities by denying membership. And members transactions with non-members must be regulated, as the Supreme Court pointed out in the *Silver* case, in order that ". . . contact with an unreliable non-member (does not) injure the member

> or the member's customer on whose behalf the contract is made and [thus] ultimately imperil the future status of the [self-regulatory organization] by sapping public confidence. *Id.*

Paragraph (12) of Section 15A(b), 15 U.S.C. § 78o-3 (b)(12), required an association to include in its rules provisions governing over-the-counter securities quotations which "are designed to produce fair and informative quotations, . . . to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations." [15]

Accordingly, Section 15A requires that the NASD regulate the business conduct of its members, which includes, when viewed in light of the Congressional intent, regulation of member/non-member relationships on the NASD's quotation system, NASDAQ, and the form and content of quotations in such system.

As asserted in the District Court, Congress intended to ensure the effectiveness of the provisions of the Maloney Act by specifying in paragraph (n) thereunder:

> [i]f any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provisions of this section shall prevail. 15 U.S.C. § 780-3(n).

While the courts, commentators, and the Securities and Exchange Commission [16] have at various times stated that

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[15] Similarly, Section 15A(b)(11), 15 U.S.C. § 78o-3(b)(11) of the Exchange Act as amended by the Securities Acts Amendments of 1975, which replaces Section 15A(b)(12), provides substantially the same requirement.

[16] *United States* v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) stated:

> By express statutory provision, Securities Exchange Act of 1934, Section 15A(n), the Rules of Fair Practice of the NASD are, when approved by the SEC, exempt from the application of the antitrust laws, if in conflict. This is not disputed. *Id.* at 693.

The Securities and Exchange Commission stated in *In the Matter of the National Association of Securities Dealers, Inc.*, 20 SEC 508 (1945) that if an NASD

Section 15A(n) acts to exempt, among other things, the NASD Rules of Fair Practice, when such rules have been reviewed by the Commission, the section has been removed from the Maloney Act by the 1975 Amendments. Congress has stated in this regard as follows:

> . . . [T]he deletion of Section 15A(n) is not intended to change existing law with respect to the relationship between antitrust and securities laws—nor is any other provision of S. 249 intended to change that relationship. S. Rep. at 14.

Therefore, in light of the express exemption from the antitrust laws which the Defendants acquired pursuant to any actions taken in accordance with and as required by the regulatory scheme set out in the Maloney Act, and under the pervasive and potent oversight of the Commission, the District Court properly granted Defendants' Motion to Dismiss.

B. *The Implied Exemption*

Even if the statutorily granted exemption was not available to Defendants with regard to the actions alleged in the Complaint, it is clear that the actions of the NASD, both directly and through its facilities operator, Bunker Ramo, and its securities clearance subsidiary, NCC, taken pursuant to the statutory mandate of the Maloney Act, fall within the scope of the Court decisions relating to implied exemptions from the antitrust laws. These implied exemptions fall within two categories: 1) where a specific provision of the statute allowing for and requiring action is complemented by subsequent regulatory action there-

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proposal conforms to the statutory requirements, Section 15A(n) makes ". . . amply clear that Section 15A prevails over 'any provision of law' with which it is in conflict" *Id.* at 513, *See also* II L. LOSS, *Securities Regulation*, Ch. 8C § 3 (2nd ed. 1961) at 1369-1370; Letter of Chairman Manuel F. Cohen dated July 30, 1965, to the Chairman of the Senate Committee on Banking and Currency included with Defendants' Memorandum in the District Court as Defendants' Exhibit 2 at 13.

under; and, 2) where the pervasiveness of the regulatory scheme is such that there is an implied repeal of the antitrust laws. Because of the factual context of the case at bar and the regulatory scheme of the Maloney Act, it is arguable that both types of implied exemptions would apply. As noted in Point I, all NASD By-Laws and rules relating to the NASDAQ system and NCC and all NCC By-Laws and rules have been reviewed and subsequently non-disapproved by the Securities and Exchange Commission.

In *Silver* the Supreme Court considered the relationship between the antitrust laws and the Exchange Act and did so with respect to the action of an exchange in ordering members to remove private direct telephone connections with the offices of a non-member. Absent any immunity pursuant to the Exchange Act, such action was a *per se* violation of the Sherman Act. 373 U.S. at 347. In concluding that there was no implied repeal of the antitrust laws based upon the facts of the case, the Supreme Court concluded that no repeal could be implied because the Exchange Act did not provide for Commission jurisdiction or review of the particular applications of the rules in question enacted by exchanges. In effect, the Commission could not affirmatively act to prevent application of rules which would have undesirable anticompetitive effects. The Supreme Court concluded that exercise of its antitrust jurisdiction was proper for two reasons:

> 1) Assertion of judicial oversight would not have resulted in conflict between agency and court because there was no possibility of review by the Commission of the exchange's act of disconnecting the wires to member's offices; and
>
> 2) Denying antitrust jurisdiction to the courts on the facts of *Silver* would have left no governmental body to perform the antitrust function of preventing an

injury to competition which could not be justified as legitimate self-regulation.

The Supreme Court stated, however, that "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." 373 U.S. at 360. Clearly differentiating regulation by the Commission of exchange activities from regulation of securities associations, the Court stated that:

> Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary actions by a registered securities association (i.e. by the NASD) § 15A(g), 15A(h), 25(a), 15 U.S.C. §§ 78o-3(g) 78o-3(h), 78y(a); See *R. H. Johnson & Co.* v. *Securities and Exchange Commission*, 198 F.2d 690 (C.A. 2d Cir., 1952), cert. den. 344 U.S. 855, 97 L.Ed. 655, 73 S. Ct. 94, a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today. 373 U.S. at 358 n. 12.

(i) The "Specific Provision" Test of *Gordon*

In *Gordon*, the Supreme Court recently found the "different case" referred to in *Silver*. *Gordon* was a private antitrust action brought against the New York Stock Exchange challenging the Exchange's minimum rate structure. In finding specific authority for the Exchange to so fix commission rates pursuant to the Exchange Act and direct regulatory authority in the Commission with respect to such actions, the Supreme Court stated:

> It is patent that the case presently a bar is indeed, that "different case" to which the court in *Silver* referred. In contrast to the circumstances of *Silver*, § 19(b) gave the SEC direct regulatory power over exchange rules and practices with respect to "the fix-

> ing of reasonable rates of commission." Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when "necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange." Since 1934 all rate changes have been brought to the attention of the SEC and it has taken an active role in review of proposed rate changes during the last 15 years. Thus, rather than presenting a case of SEC impotence to affect application of exchange rules in particular circumstances, this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity. 422 U.S. at 685.

Having determined that *Gordon* was, in fact, that "different case" the Supreme Court proceeded to hold that the requirements for implied repeal of the antitrust laws was clearly satisfied in that to ". . . permit operation of the antitrust laws with respect to commission rates . . . would unduly interfere . . . with the operation of the Securities Exchange Act." *Id.* at 685-686.

In setting out the "specific provision" test, the Court thereby determined that repeal of the antitrust laws need not be implied because of a pervasive regulatory scheme, but because of the specific provision of the Exchange Act allowing for Commission action and the regulatory action thereunder.

The *Gordon* decision recognized that, as determined by the District Court and this Court, to deny antitrust immunity with respect to the specific factual pattern would be to subject the exchanges and their members to conflicting standards, since the sole aim of antitrust legislation is to protect competition while the Commission's consideration, includes, in addition to the protection of competition, the

economic health of investors, the exchanges and securities industry. *Id.* at 689.

It is clear in the factual context of the case at bar that the *Gordon* test has been met. The Maloney Act, particularly the specific provisions contained within Section 15A (b)(8), Section 15A(b)(12), Section 15A(j), and Section 15A(k) gave the Commission direct regulatory power and mandated positive action over NASD rules and practices with regard to the exclusionary actions alleged by Plaintiff. The Commission was authorized to disapprove or alter, amend, supplement or abrogate such rules and practices, if necessary, and the NASD and NCC have submitted such rules and practices to the Commission for appropriate review and regulation since 1939 and 1971 respectively.

(ii) The "Pervasive Regulatory Scheme" Test

In enunciating the "specific provision" test, the *Gordon* court noted that ". . . in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws." *Id.* at 688. In *United States* v. *NASD, supra*, the Supreme Court held that the regulatory authority conferred upon the Commission by the Maloney Act and the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*, displaced the antitrust laws where the NASD's rules and policies directed certain sales and distribution practices employed in selling mutual funds. Where these practices were contemplated or permitted by Congress in enacting the statute and the Commission's regulatory authority over NASD activities are so extensive pursuant to the statutory scheme there is an implied repeal of the antitrust laws. *United States* v. *NASD, supra*, at 732-735.

In discussing the authorization, granted by the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*, to the NASD and the Commission, in order to rid the indus-

try of certain abuses brought about by "bootleg" dealers, the Supreme Court noted:

> . . . (these sections) . . . reflect the same basic relationship between the SEC and the NASD that is established by the Maloney Act. . . . The industry thus is afforded the initial opportunity to police its own practices. If, however, industry self-regulation proves insufficient, § 22(c) authorizes the Commission to make rules and regulations . . . and proclaim that the SEC rules and regulations supercede any inconsistent rules of the registered securities association. *United States* v. *NASD, supra,* at 710, n. 19.

Sections 15A(b), (e), (h), (j) and (k) reflected this relationship. It should be noted that Congress has recently clarified its intent with regard to industry self-regulation:

> Industry regulation and governmental regulation are not alternatives, but complementary components of the self-regulatory process. . . . The self-regulatory organizations exercise authority subject to SEC oversight. They have no authority to regulate independently of the SEC's control. S. Rep. 94-75 at 22-23.

Further:

> In 1936, this Committee pointed out that a major responsibility of the SEC in the administration of the securities laws is to "create a fair field of competition." This responsibility continues today. *Id.* at 8.

In *United States* v. *NASD, supra,* the Justice Department argued that certain activities of the defendants constituted a conspiracy between the NASD and its members in restraint of trade. In the case at bar, Plaintiff has argued that the exclusionary rules and practcies of the NASD with regard to the NASDAQ system and NCC, and similar rules and practices of NCC and its members have been in restraint of trade and injurious to Plaintiff.

In being advised by the government, in *United States* v. *NASD,* that its complaint was not to be read as a direct

attack on NASD rules but a challenge to various unofficial NASD interpretations, the Supreme Court stated:

> In view of the scope of the SEC's regulatory authority over the activities of the NASD, the government's decision to withdraw from direct attack on the association's rules was prudent. The SEC's supervisory authority over the NASD is extensive. Not only does the Maloney Act require the SEC to determine whether an association satisfies the strict statutory requirements of that Act and thus qualifies to engage in supervised regulation of the trading activities of its membership, 15 U.S.C. § 78o-3(b), it requires registered associations thereafter to submit for Commission approval any proposed rule changes, § 78o-3(j). The Maloney Act additionally authorizes the SEC to request changes in or supplementation of association rules, a power that recently has been exercised . . ., If such a request is not complied with, the SEC may order such change itself. § 78o-3(k)(2). *Id.* at 732.

Further:

> The SEC, in its exercise of authority over association rules and practices, is charged with protection of the public interest as well as the interests of shareholders, see, *e.g.*, 15 U.S.C. § 78o-3(a)(1), (b)(3), (c), and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility. (citations omitted) As the court previously has recognized, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227 n. 60 (1940), the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC. *Id.*
>
> We further conclude that the Government's attack on NASD interpretations of those rules cannot be maintained under the Sherman Act, for we see no meaningful distinction between the Association's rules and the manner in which it construes and implements them. Each is equally a subject of SEC oversight. *Id.* at 733.

Therefore, the Supreme Court held that implied repeal of the antitrust laws was necessary to make the regulatory scheme work as per *Silver, supra.*

In the case at bar, the antitrust laws must also be displaced by the pervasive regulatory scheme to ensure that Defendants are not subject to duplicative and inconsistent standards as per *United States* v. *NASD* in order that the Exchange Act may continue to work as Congress so intended. It is clear that the actions taken by Defendants were pursuant to the Maloney Act and subject to the active oversight and review of the Securities and Exchange Commission.

Accordingly, the District Court properly granted Defendants Motion to Dismiss since Defendants' actions were, as to the antitrust laws, expressly immune by statute and impliedly immune by the aforementioned court decisions.

POINT III

The Securities Acts Amendments of 1975 Do Not Require That the Judgment Be Vacated and That This Action Be Remanded to the District Court for Further Consideration.

The NASD rules and procedures, which Plaintiff challenges in this case, came into being prior to the passage of the Securities Acts Amendments of 1975. Plaintiff, however, has argued that the passage of the Securities Acts Amendments of 1975 "brings about sweeping changes which require that this action be remanded [to the District Court]." Appellants Brief at 8. Plaintiff's argument, in effect, proves too much.

Assuming, *arguendo,* that the 1975 Amendments would affect the case at bar, the only effect of the Amendments is to confirm the District Court's conclusion that the Securities and Exchange Commission has primary and exclusive jurisdiction over the anti-competitive effects of NASD and NCC rules and that Plaintiff has failed to exhaust his administrative remedies.

As discussed previously, prior to the 1975 Amendments, the Commission was empowered to review the initial rules and subsequent amendments thereto of national securities associations based upon Congressionally established standards which included the requirement that:

> the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commission or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges. 15 U.S.C. § 78o-3 (b)(8).

In the event the Commission determined that any of the requirements were not satisfied, Section 15A(e) provided that, after appropriate notice and opportunity for hearing, "the commission shall deny such registration." 15 U.S.C. § 78o-3(e).

Any subsequent changes in or additions to the rules of the securities association were required by Section 15A(j) to be submitted to the Commission, prior to becoming effective. Under this provision, the Commission had the authority to enter an order disapproving such change or addition. 15 U.S.C. § 78o-3(j).

Under the 1975 Amendments, the Commission retains its oversight over registration of national securities associations under similar but now expanded statutory requirements. The similarity can be clearly seen in new Section 15A(b)(6) which provides that:

> *The rules of the Association are designed to prevent fraudulent and manipulative acts and practices, to*

> *promote just and equitable principles of trade,* to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to *remove impediments to and perfect the mechanism of a free and open market* and a national market system, *and, in general to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged* by its members, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association. 15 U.S.C. § 78o-3(b)(6). [Emphasis added].

The Commission also retains its power to deny registration under new Section 19(a)(1) of the Exchange Act as amended. 15 U.S.C. § 78s(a)(1). As to review of changes and additions to association rules, new Section 19(b) now places on the Commission an affirmative obligation to approve a proposed rule change [17] when found to be consistent with the requirements of the Exchange Act. 15 U.S.C. § 78s(b)(2). In making its determination as to the consistency of the proposed changes with the requirements of the Exchange Act, Congress has provided that the Commission publish notice of such change with either the terms of substance of the proposed change or a description of the subjects and issues involved. Additionally, the Commission is required to give interested parties an opportunity to submit comments concerning the proposed change. *Id.*

The Commission has also been granted the power to review previously filed rules of all self-regulatory organizations, including the NASD, under the same procedures. This expansion of the authority of the Commission to re-

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[17] The ability of the Commission to abrogate a rule of a securities association under old Section 15A(k), 15 U.S.C. § 78o-3(k), has been carried foward in the new legislation in Section 19(c), 15 U.S.C. § 78s(c).

view not only new amendments, but existing rules previously filed, evidences the confidence which Congress has placed in the Securities and Exchange Commission as the technical expert and the primary focal point for review of compliance with the Exchange Act.

Congressional confidence in the Commission's ability to review association and exchange rules is expressly stated in the legislative history of the Securities Acts Amendments of 1975. In its report on S. 249 (the Securities Acts Amendments of 1975), the Senate Subcommittee on Securities stated:

> Unfortunately, because of excessive and unnecessary regulatory restraints, competition in the securities industry has not been as vigorous and as effective in advancing the public interest as it could be. The Committee concluded, however, that rather than amending the Exchange Act to eliminate particular enumerated barriers to competition, the most effective way to foster competition would be to charge the Commission with an explicit obligation to eliminate all present and future competitive restraints that cannot be justified by the purposes of the Exchange Act. Following this pattern, various sections of S. 249 would direct the Commission to remove existing burdens on competition and to refrain from imposing or permitting to be imposed, any new regulatory burden on competition "not necessary or appropriate in furtherance of the purposes" of the Exchange Act.
>
> This explicit obligation to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions. S. Rep. No. 94-75, 94th Cong. 1st Sess. 13 (1975).

If there was any doubt prior to the 1975 Amendments as to whether Congress intended the Commission to have primary jurisdiction over the anti-competitive effects of

a securities association's or an exchange's rules, such doubt has been eliminated.

The question still remains, however, as to what are the sweeping changes to which Plaintiff has referred. As is readily seen in the discussion above, while the Commission's authority has been expanded, the prior scope of Commission oversight as it relates to a securities association appears to be substantially unchanged. S. Rep. No. 94-75 *supra,* appears to us to succinctly state the change:

> The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound. The bill would extend the pattern now applicable to registered associations to exchanges. *Id.* at 27.

Plaintiff's demand that this Court remand a challenge to NASD rules to the District Court for its views on such challenge, without the benefit of review by the Commission, cannot be granted.

CONCLUSION

THE JUDGMENT AND ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
January, 1976

Respectfully submitted

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AFFIDAVIT OF SERVICE BY MAIL

I, Jeffrey M. Silow, one of the Counsel for Defendants-Appellees National Association of Securities Dealers, Inc., Bunker Ramo Corporation and National Clearing Corporation, being duly sworn, depose and say that I, this 16th day of January, 1976, have caused copies of the foregoing Appellees' Brief of Defendants-Appellees National Association of Securities Dealers, Inc., Bunker Ramo Corporation and National Clearing Corporation to be filed with the Clerk of the United States Court of Appeals for the Second Circuit and have served said Appellees' Brief upon all parties to this litigation by depositing true copies of said Appellees' Brief into the United States mail, postage prepaid, addressed to each of the persons listed below:

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Sworn to before me this 16th day of January, 1976.

Margaret R. Conley, Notary Public

My Commission expires April 14, 1979.